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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-6259

INEZ MOORE,
Appellant

-vs-

CITY OF EAST CLEVELAND, OHIO
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO.

INEZ MOORE,
Defendant-Appellant

-vs-

CITY OF EAST CLEVELAND, OHIO
Plaintiff-Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

The appellant appeals from the judgment of the Supreme Court of Ohio, entered on November 28, 1975, affirming a judgment of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga upholding the constitutionality of a zoning ordinance of the City of East Cleveland, Ohio. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

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OPINION BELOW

There was no opinion filed by the Supreme Court of Ohio with its final judgment dismissing the appeal. The court held that no substantial constitutional questions existed. The opinion on the merits was delivered at an earlier stage in the proceeding when the Court of Appeals of Ohio, Eighth District, County of Cuyahoga affirmed the judgment of the East Cleveland Municipal Court denying the defendant's motion to dismiss and finding the defendant guilty. The opinion of the Court of Appeals is unreported but set forth in the Appendix, infra, at pp. 3a-13a.

JURISDICTION

The decision and judgment of the Supreme Court of Ohio was filed on November 28, 1975. Notice of Appeal was filed in the Supreme Court of Ohio on February 20, 1976. The jurisdiction of this Court to review the decision by appeal is conferred by 28 U.S.C. Sec. 1257(2) and is sustained by the following decisions: Cohen v. California, 403 U.S. 15 (1971); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

ORDINANCES INVOLVED

Section 1351.02 (1966) of the Ordinances of the City of East Cleveland provides:

> The occupancy of any dwelling unit shall be limited to one and only one, family and to any authorized persons occupying such dwelling unit with such family.

Section 1341.08 (1966) of the Ordinances of the City of East Cleveland provides:

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) Husband or wife of the nominal head of the household.

(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual.
(Ord. 5744. Passed 7-26-66).

QUESTION PRESENTED

Whether the City of East Cleveland, Ohio, consistent with the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, may punish the Appellant for violation of an ordinance which prohibits five blood related family members, as opposed to people living together in a communal arrangement, from living together solely because they do not constitute a "family" as defined by the ordinance. The five people include the appellant, her two natural sons, and their respective natural sons.

STATEMENT OF THE CASE

The appellant was fined $25.00 and sentenced to five days in jail because her two sons and their respective sons, the appellant's natural grandsons, lived with her in her single family home. The judgment and sentence came about solely because these five closely related blood relatives, living together, did not meet the narrow definition of "family" imposed by Section 1341.08 of the Codified Ordinances of the City of East Cleveland, Ohio.

The criminal complaint was made by a housing inspector for violation of Section 1351.02 of the Codified Ordinances of the City of East Cleveland, Ohio. This ordinance provides that a dwelling unit shall be occupied by one family as defined by Section 1341.08 of the ordinances.

The federal constitutional questions sought to be reviewed were first raised in the trial court by a motion to dismiss. The Court denied the motion to dismiss and found the appellant guilty of violating Section 1351.02 and entered judgment. (App., infra, p. 4a).

The constitutional questions were considered on appeal by the Court of Appeals which upheld the conviction in a 2 - 1 decision. (App., infra, pp. 3a-13a). The appellant then raised the constitutional issues on appeal to the Supreme Court of Ohio which dismissed the appeal. The court found that no substantial constitutional question exists but did not write an opinion. (App., infra, p. 1a-2a).

The majority opinion of the Court of Appeals characterized the issues before it in the following manner:

> Sec. 1341.08 does not involve the rights of association, travel or privacy nor other "fundamental" right guaranteed by the United States Constitution. Therefore, defendant's argument that Sec. 1341.08 violates her rights of association, travel and privacy is without merit. (App., infra, p. 6a).

The majority found that Section 1341.08 does not violate the equal protection clauses and disagreed with appellants argument that the ordinance is unreasonable and arbitrary on its face. (App., infra, p. 7a).

However, Presiding Judge Jack G. Day in his dissent stated:

> The intereference with a blood related group living as a family, qua family, is arbitrary, unreasonable, and capricious on its face and, therefore, violates due process of law. (App., infra, p. 10a).

The dissenting opinion noted that the right to determine one's association without governmental inference is invested with a special gravity when the association in question involves the family and that the instant case involves a definition of family so arbitrary and so ill suited to the regulation of population density that the presence of the "unequal hand" is patent.

THE QUESTIONS ARE SUBSTANTIAL

Section 1341.08 of the Ordinances of the City of East Cleveland represents a heavy handed intrusion on a highly valued institution, the American family. The opinions of the lower courts have sanctioned this invasion of the fundamental constitutional rights of the appellant.

The ordinance,if allowed to stand, will effectively contribute to the destruction of the Appellant's extended family and other similar traditional family units which have historically been afforded a special and privileged legal position. Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, at 911 (1970).

I. THE ORDINANCE VIOLATES THE APPELLANT'S RIGHT OF FREE ASSOCIATION.

The decisions of this court have established that the First Amendment and its embodiment in the Fourth Amendment generally protect the right of human association from governmental intrusion. NAACP v. Britton, 371 U.S. 415, 430 (1963).

The family is one of the most important modes of association and the center of human feeling and trust. This Court has given special associational protection to this most traditional of human groupings. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

The East Cleveland ordinance clearly denies the appellant her right to association with her family.

II. THE ORDINANCE VIOLATES THE APPELLANT'S RIGHT OF PRIVACY.

There is a vital relationship between the freedom of association and the constitutional right of privacy. Mr. Justice Brandeis defined privacy as "against the Government, the right to be let alone...the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438,

478 (1928) (dissenting opinion).

The Appellant's personal decision to establish a home is a right guaranteed by the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

The appellant's choice to include family members as companions in her home involves deeply personal considerations relating to the quality of relationships therein. Her decision is within the concept of the right to privacy protected by the constitution. Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (Marshall, dissenting).

III. THE ORDINANCE VIOLATES THE APPELLANT'S RIGHT TO EQUAL PROTECTION OF THE LAW.

The East Cleveland ordinance creates a definition of "family" which infringes upon the fundamental rights of freedom of association and the right to privacy. The application of strict equal protection scrutiny is therefore required.

When it is shown that a classification has these characteristics, the ordinance can withstand judicial scrutiny only when it is shown that the burden imposed on the individual constitutional rights is necessary to protect a compelling and substantial governmental interest. Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The City of East Cleveland did not offer one shred of evidence in the trial court to demonstrate such an interest.

Assuming, however, that the Appellee did prove that a compelling state interest exists, the task of demonstrating that no less intrusive means exists which will adequately protect the compelling state interest is upon the party seeking to justify the burden. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Speiser v. Randall, 357 U.S. 513 (1958); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Britton, 371 U.S. 415 (1963); NAACP v. Alabama, 377 U.S. 288 (1964).

The Appellee has failed to demonstrate that an alternative means less threatening to the appellant's fundamental constitutional rights is unavailable. If the intent of the City in enacting and enforcing Sec. 1341.08 is to control density, then it is blatantly obvious that the city can avail itself of an existing law which is much less invasive of the fundamental rights of privacy and free association.

Section 1351.03 provides an adequate density control scheme which is constitutionally acceptable. (App., infra, p. 13a).

Even if it is assumed that no fundamental right is involved and that the "rational basis" test should be applied, the ordinance still violates the Fourteenth Amendment. The stated goal of the ordinance are to alleviate traffic congestion and to save the school district money. (App., infor. p. 7 a). There is no rational relationship between these purposes and the classifications set up in Sec. 1341.08.

The ordinance forbids one class, an extended family of five members, such as the appellant's, from living together. However, the same law permits a family of twenty members to live together if they are of consanguinity one degree closer than that of the appellant's family.

The Equal Protection Clause denies to the city the power to decide by legislation that different treatment be accorded to persons placed by an ordinance into different classes on the basis of criteria wholly unrelated to the ordinance.

The classification must be reasonable, not arbitrary, and must rest upon a ground of difference having a fair and substantial relationship to the purpose of the legislation. All persons in similar circumstances must be treated alike. Reed v. Reed, 404 U.S. 71, 76 (1971); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

The ordinance in question represents the type of arbitrary legislative choice forbidden by the Constitution. By providing dissimilar treatment for families which are similarly situated, the ordinance violates the equal protection clause. Reed v. Reed, supra.

IV. THE ORDINANCE VIOLATES THE APPELLANT'S RIGHT TO DUE PROCESS OF LAW.

Zoning ordinances violate the due process clause when they do not bear a substantial relation to the public health, safety, morals or general welfare. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Euclid v. Ambler Realty, 272 U.S. 365 (1926).

The East Cleveland ordinance at issue is an attempt to enforce the city's personal preference on the appellant and is not substantially related to a legitimate government objective. It is an arbitrary and capricious exercise of power inconsistent with appellant's right to due process under the law.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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3408 Lorain Avenue
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Legal Aid Society of Cleveland

ATTORNEY FOR APPELLANT

APPENDIX

APPENDIX

SC 7-A

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 75 TERM
To wit: November 28, 1975

Inez Moore,
Appellant,

vs.

City of East Cleveland,
Appellee.

No. 75-896

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for CUYAHOGA *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Legal Aid Society

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

SC-10A

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 75 TERM
To wit: November 28, 1975

Inez Moore,
Appellant,

vs.

City of East Cleveland,
Appellee.

No. 75-896

APPEAL FROM THE COURT OF APPEALS

for CUYAHOGA *County*

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CUYAHOGA *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 33888

City of East Cleveland

APPELLEE

-vs-

Inez Moore

APPELLANT

APPEAL FROM

EAST CLEVELAND MUNI. COURT

No. 163,307

JOURNAL ENTRY

DATE July 18, 1975

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the East Cleveland Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the East Cleveland Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On January 16, 1974 the defendant-appellant, Inez Moore, was cited by an East Cleveland deputy housing inspector for violation of Sec. 1351.02 of Ordinance 6010 of the City of East Cleveland. (All references to code sections are to the Ordinances of the City of East Cleveland unless otherwise indicated.) The defendant was residing in her home with her sons, Dale Moore and John Moore, and their sons Dale Moore, Jr. and John Moore, Jr. Sec. 1351.02 provides that a dwelling unit shall be occupied by only one family, and under the definition in Sec. 1341.08 the defendant, her sons and grandsons constitute more than one family. The notice of violation served upon the defendant alleged that John Moore, Jr., age 7, was an illegal occupant of her dwelling.

The defendant entered a plea of not guilty to the charge and filed a motion to dismiss the action on the ground that Sec. 1341.08 is unconstitutional.

On May 17, 1974 the court denied the motion to dismiss and found the defendant guilty of violating Sec. 1351.02. The court entered judgment against her and she now appeals assigning one error:

> The lower court erred in overruling Appellant's motion for dismissal upon the grounds that the ordinances in question were unconstitutional as violations of Appellant's rights to freedom of association, travel, privacy, and Appellant's rights to equal protection under the laws and due process of law.

The question of the constitutionality of Sec. 1341.08 was before this court in Hilson v. City of East Cleveland (Court of Appeals No. 30544, 1971) in which we held that the ordinance as applied by Sec. 1351.02 was not unconstitutionally void for vagueness. The two ordinances read as follows:

> "1351.02 LIMITATION ON OCCUPANCY.
> "The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family."

> "1341.08 FAMILY.
> "'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
> "(a) Husband or wife of the nominal head of the household.
> "(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
> "(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
> "(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent

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person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

"(e) A family may consist of one individual."

In the instant case, the defendant specifically challenges subsection (d) of Sec. 1341.08 and argues that it is an irrational exercise of legislative power because it so narrowly defines the word "family." She argues further that since she and her two sons and two grandsons are a traditional blood-related family, they should be able to live together in the same dwelling free from unreasonable governmental interference. Yet under the definition of Sec. 1341.08(d) the defendant's family is more than one family and Sec. 1351.02 proscribes their living together in the same dwelling unit.

The defendant contends that Sec. 1341.08 should be struck down because it violates her constitutionally guaranteed "fundamental" rights of association, travel and privacy. Furthermore, she argues that the ordinance transgresses the equal protection and due process clauses of the United States Constitution. For the reasons set forth below, we find all of these arguments to be without merit.

In Village of Belle Terre v. Boraas (1974), 416 U.S. 1, the Supreme Court recently considered the constitutionality of an ordinance enacted in a small New York community which defined "family" as,

> "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

The constitutionality of the ordinance had been challenged by a group of more than two unrelated students living together as a single housekeeping unit in a single family dwelling. Speaking for the majority of the court which affirmed the constitutionality of the ordinance, Mr. Justice Douglas noted,

> "The present ordinance is challenged on several grounds: that it interferes with a person's right to travel;...that it bars people who are uncongenial to the present residents;...that the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy;..."
>
> "We find none of these reasons in the record before us. It is not aimed at transients....It involves no 'fundamental' right guaranteed by the Constitution, such as...the right of association,...or any rights of privacy,..."
>
> 416 U.S. at 7.

In Belle Terre the Supreme Court held that the town ordinance defining a family involved no "fundamental" right guaranteed by Constitution. That holding is equally applicable to the instant case.

Sec. 1341.08 does not involve the rights of association, travel or privacy nor any other "fundamental" right guaranteed by the United States Constitution. Therefore, the defendant's argument that Sec. 1341.08 violates her rights of association, travel and privacy is without merit. See also: Palo Alto Tenants Union v. Morgan (1970), 321 F. Supp. 908 and Rademan v. City of County of Denver (1974), 526 P. 2d 1325.

Considering the defendant's final contentions -- that Sec. 1341.08 is violative of the equal protection and due process clauses -- we note that the Constitution of the State of Ohio, Section 3, Article XVIII states:

> "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The purpose underlying the enactment of all East Cleveland Housing Code Ordinances is set forth in Sec. 1343.02 as follows:

> "...to establish minimum standards necessary to make all dwelling structures safe, sanitary, free from fire and health hazards, and fit for human habitation and beneficial to the public welfare; to establish minimum standards governing the maintenance of dwelling structures in such condition as will not constitute a blighting or deteriorating influence on the neighborhood and the community; to protect property values

> and to maintain the character and appearance of the community and neighborhoods within the community; to fix responsibilities for owners and occupants of dwelling structures with respect to sanitation, repair and maintenance;...."

Two reasons for eancting and enforcing Sec. 1341.08 are mentioned by counsel for East Cleveland in his brief: 1) to help alleviate traffic congestion, and 2) to lessen the possible financial burden on the city school system which would result from an inordinate number of school age children residing in a single dwelling which would consequently generate a disproportionately small real estate tax revenue per child.

The defendant failed to present the trial court with any evidence to support her contention that Sec. 1341.08 is violative of the equal protection and due process clauses. Rather she rests on the assertion in her appellate brief, that the ordinance is unreasonable and arbitrary on its face. We disagree.

A municipal ordinance enacted pursuant to the legislative exercise of local police power is valid unless it clearly bears no real and substantial relation to public health, safety, morals or general welfare. Benjamin v. City of Columbus (1957), 167 Ohio St. 103; Curtiss v. Cleveland (1959), 170 Ohio St. 127.

As this court recently stated in syllabus 3 of Alsenas v. City of Brecksville (1972), 29 Ohio App. 2d 255:

> "To prevail in such a case the complainant must also clearly establish that the ordinances he attacks do not bear a real and substantial relation to the public health, safety, morals or general welfare and are, in turn, unreasonable or arbitrary, that is, in substance, that the local legislative authority could not have reasonably believed or, in permitting such legislation to remain in force, cannot reasonably believe that the necessity of regulation in the public interest outweighs, qualitatively, the impact imposed on the individual property owner."

A duly enacted municipal ordinance is presumed to be constitutionally valid. The burden of establishing the unconstitutionality of such an ordinance is upon the one challenging its validity. Cleveland v. Antonio (1955), 100 Ohio App. 334.

7a

Since the defendant presents no evidence to rebut the presumption of legislative validity, we find that Sec. 1341.08 bears a real and substantial relation to public health, safety or welfare and is, therefore, valid. See City of East Cleveland v. Palmer (1974), 40 Ohio App. 2d 10.

Affirmed.

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GERALD E. FUERST
By Regina Marjuch

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the E. Cleve. Muni. Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, P.J., DISSENTS (See dissenting opinion attached);

MANOS, J.,

SILBERT, J., CONCUR.

PRESIDING JUDGE
JACK G. DAY

(Silbert, J., retired judge of the 8th appellate district, sitting by assignment.)

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

For plaintiff appellee: Leonard Young
For defendant appellant: Frank Murtaugh

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...S MAILED TO COUNSEL FOR ...L PARTIES. — COSTS TAXED.

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 33888

City of East Cleveland

PLAINTIFF— APPELLEE

-vs-

Inez Moore

DEFENDANT-APPELLANT

APPEAL FROM

EAST CLEVELAND MUNICIPAL COURT

No. 163,307

JOURNAL ENTRY

DISSENTING OPINION

DATE July 18, 1975

DAY, J., DISSENTING:

Respectfully, I dissent.

In this case a grandmother was fined $25 and sentenced to five days in jail because two sons and their respective sons, her grandsons, lived with her in a single family house. The judgment and sentence comes about because the defendant's family configuration does not meet the definition imposed by the East Cleveland ordinance which is set out in the margin and underlined. 1/

1/ "1341.08 FAMILY.

"'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished him by the nominal head of the household and the spouse of the nominal head of the household.

"(e) A family may consist of one individual. (Ord. 5744. Passed 7-26-66.)"

9a

I.

In 1971 an entry of this court held the ordinance not "unconstitutionally vague", Hilson v. City of East Cleveland, Case No. 30544. That decision is not dispositive of the present issue. For the vice of that part of the ordinance involved in the instant case is not that it is vague. Its very precision is an element in its unconstitutionality. The interference with a blood related group living as a family, qua family, is arbitrary, unreasonable, and capricious on its face and, therefore, violates due process of law.

II.

Few constitutional rights are more important than the right to determine one's associations without governmental interference, NAACP v. Alabama (1958), 357 U.S. 449, 460-462, 2 L. Ed. 2d 1488, 1498-1499. The right is invested with special gravity when the association in question involves the family or race, cf. Loving v. Virginia (1967), 388 U.S. 1, 7-9, 18 L. Ed. 2d 1010, 1015-1016. It is fundamental that even a legitimate governmental ojbective, when its pursuit affects constitutional rights, is tested by the availability of alternative means less threatening to liberty:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means of achieving the same purpose." (emphasis supplied) Shelton v. Tucker (1960), 364 U.S. 479, 489; NAACP v. Button (1963), 371 U.S. 415, 423; NAACP v. Alabama (1964), 377 U.S. 288, 307-308. 2/

2/ Indeed the least inhibiting means may be required. See fn. 29 of Mr. Justice Brennan's concurrence in Abington School District v. Schempp (1963), 374 U.S. 203, 265, 10 L. Ed. 2d 844, 883, and cases collected there.

10a

If the ordinable objective is to regulate housing density in the interest of health, safety and welfare - a legitimate city objective and the only discernible one - there "are less drastic means of achieving the same purpose" and the City has, in fact, already utilized one of them.

Ordinance 1351.03 of the City of East Cleveland makes elaborate provision for regulating the condition and size of habitable floor areas in the City including a standard number of square feet per occupant.[3] Without assessing the validity of the standards in Ordinance 1351.03, it is obvious that its density control scheme is an approach less invasive of the right of association and directly relevant to a health, safety and welfare purpose than the definition in Ordinance 1341.08(d).

III.

Whether and to what extent government has constitutional authority to define and regulate living groupings other than a family related by blood can be left to another time. But even if the state may intervene within federally approved limits, see Village of Belle Terre v. Boraas (1974), 416 U.S. 1, 7-9, 39 L. Ed. 2d 797, 803-804, that does not mean that a state constitution may not impose higher obstacles to government interference. Federal constitutional safeguards are a floor not a ceiling, Oregon v. Hass (1975), ___ U.S. ___, 43 L. Ed. 2d 570, 575-576; Cooper v. California (1967), 386 U.S. 58, 62, 17 L. Ed. 2d 730, 734. But decision in the present case need not founder on Belle Terre in any event. For that case is not germane to this case. The ordinance Belle Terre approved did not define a family to exclude persons "related by blood from living together as a family".

3/ Ordinance 1351.03(e) provides:
"Every dwelling unit shall contain at least 150 square feet of habitable floor area for the first occupant thereof and at least 100 additional square feet of habitable floor area for every additional occupant thereof, but in no case shall any dwelling unit conta less than 250 square feet of habitable floor area."

IV.

There is another constitutional frailty inherent in Ordinance 1341.08's definition of the family. It does not define a reasonable category which can pass the tests for validity under the equal protection clause.[4]

In utilizing the family definition in issue, a classification was established which is suspect because it involves the fundamental right to association, NAACP v. Alabama, id., in the privacy of the family, cf. Loving v. Virginia, id. 388 U.S. at 11-12, 18 L. Ed. 2d at 1017-1018; and Griswold v. Connecticut (1965), 381 U.S. 479, 485-487, 14 L. Ed. 2d 510, 515-516. When it is shown that a classification has these characteristics, the state (city) must show some compelling state interest to justify it, Shapiro v. Thompson (1969), 394 U.S. 618, 634, 638, 22 L. Ed. 2d 600, 615, 617. At very least the State has not shown a compelling state interest that could not have been satisfied by alternate means.

When the classification is neither suspect nor invasive of a fundamental right, it still must rationally be related to a legitimate governmental goal if it is to avoid the taint of arbitrariness, Reed v. Reed (1971), 404 U.S. 71, 75-77, 30 L. Ed. 2d 225, 229-230. Rational relationship departs from the classification here when it attempts to regulate the composition of family to accomplish an end served as well or better under another ordinance (see fn. 3, supra).

Finally, legislation which comports with equal protection must impose its regulation impartially, Yick Wo v. Hopkins (1886), 118 U.S. 356, 373-374, 30 L. Ed. 220, 227:

4/ McGowan v. Maryland (1961), 366 U.S. 420, 6 L. Ed. 2d 393, involved Sunday closing laws. The statutes were upheld using the test that it must stand if "any state of facts reasonably may be conceived to justify it", cf. 366 U.S. at 425-426, 6 L. Ed. 2d at 399. The fundamental rights involved here were not involved in McGowan and different principles apply here.

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The instant case involves a definition of family so arbitrary and so ill suited to the regulation of population density that the presence of the "unequal hand" is patent. It does "make unjust and illegal discriminations between persons in similar circumstances" with consequences which are material to their rights.

I would declare Ordinance 1341.08(d) unconstitutional in the parts pertinent to this case, reverse the judgment, and discharge the defendant.

1351.03 HABITABLE FLOOR AREA.

Every dwelling unit shall conform to the following standards:

(a) No portion of any room which does not presently meet all of the requirements for habitable rooms under any section of this Housing Code shall be included in determining the habitable floor area of a dwelling unit.

(b) Every dwelling unit shall have not less than 250 square feet of habitable floor area and shall contain at least one room which shall have not less than 150 square feet of habitable floor area and which is not less than ten feet in width; provided further that no room used to compute compliance with such 250 square foot minimum limitation shall be less than seven feet in width nor have less than seventy square feet of habitable floor area.

(c) No portion of any room which is less than seven feet in width shall be included in determining habitable floor area.

(d) All habitable rooms shall have a clear ceiling height of not less than seven feet, provided that rooms with sloping ceilings shall have a clear ceiling height of not less than six feet, nine inches in at least one-half of their habitable floor area. In determining the habitable floor area of rooms with sloping ceilings, all portions of less than five feet in height shall be disregarded.

(e) Every dwelling unit shall contain at least 150 square feet of habitable floor area for the first occupant thereof and at least 100 additional square feet of habitable floor area for every additional occupant thereof, but in no case shall any dwelling unit contain less than 250 square feet of habitable floor area.

(f) The third floor area of a double house, of a two-family dwelling or of a multi-family dwelling consisting of side-by-side dwelling units, sometimes known as row houses, shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit in such double house, two-family dwelling or multi-family dwelling to the extent permitted by subsection (1) hereof, but subject to the requirements and limitations of subsection (2) hereof, as follows:

(1) A. Where there are two separate approved stairways from the third floor area to the ground floor of such building, seventy-five percent of the habitable floor area of the third floor shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit in a double house or multi-family dwelling or occupying the second floor of a two-family dwelling;

B. Where there is only one approved stairway from the third floor area to the ground floor of such building, fifty percent of the habitable floor area of the third floor shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit in a double house or multi-family dwelling or occupying the second floor of a two-family dwelling.

C. For the purpose of this subsection, "approved stairway" means a stairway which satisfies the requirements of rules and regulations adopted pursuant to Section 1345.09.

(2) A. No portion of the habitable floor area on the third floor shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit on the first floor of a two-family dwelling.

B. No portion of the floor area on the third floor used for storage purposes shall be included in determining the habitable floor area of such third floor.

C. No portion of any room on the third floor which does not presently meet all of the requirements for habitable rooms under any section of this Housing Code shall be included in determining the habitable floor area of such third floor.

D. No portion of the habitable floor area on the third floor of any dwelling shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit in such dwelling unless such family has the exclusive use, other than for storage purposes, of such third floor. (Ord. 5798. Passed 1-24-67.)

15a

IN THE SUPREME COURT OF THE STATE OF OHIO

NO. 75-896

INEZ MOORE	:
Appellant	:
-vs-	:
CITY OF EAST CLEVELAND, OHIO	:
Appellee	:

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Inez Moore, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of November 28, 1975 affirming the judgment of Conviction, entered herein on May 17, 1974.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

FRANCIS MAGUIGH, JR.
Attorney for Inez Moore, Appellant
Legal Aid Society of Cleveland
3408 Lorain Avenue
Cleveland, Ohio 44113

Filed February 23, 1976

PROOF OF SERVICE

AFFIDAVIT

I, FRANCIS MURTAUGH, JR., Attorney for Inez Moore, appellant herein, depose and say that on the 20th day of February, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the City of East Cleveland, Ohio, appellee herein, by mailing a copy in a duly addressed envelope, first class postage prepaid, to its counsel of record, Henry B. Fisher, Director of Law, The City of East Cleveland, 14340 Euclid Avenue, East Cleveland, Ohio 44112.

All parties required to be served have been served.

FRANCIS MURTAUGH, JR.

Subscribed and Sworn to, before me, at Cleveland, Ohio this_____day of February, 1976.

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